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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Federal Trade Commission,

No. CV-23-02711-PHX-DWL

Plaintiff,

ORDER

V.

Grand Canyon Education Incorporated, et al.,

Defendants.

There are four fully briefed motions pending before the Court: (1) a motion to dismiss filed by Defendant Grand Canyon University (“GCU”) (Doc. 71); (2) a motion to quash and/or for protective order filed by GCU (Doc. 117); (3) a motion to strike affirmative defenses filed by Plaintiff Federal Trade Commission (“FTC”) (Doc. 124); and (4) a motion for a stay of discovery filed by Defendants Grand Canyon Education, Inc. (“GCE”) and Brian E. Mueller (“Mueller”) (Doc. 136). Each motion is addressed below.

DISCUSSION

I. GCU's Motion To Dismiss

A. Relevant Background

In its original complaint in this action, the FTC sued GCU, GCE, and Mueller, who is GCU’s president and GCE’s CEO and chairman of the board. (Doc. 25.) The complaint asserted five causes of action: (1) making deceptive representations concerning GCU’s status as a nonprofit institution, in violation of § 5 of the FTC Act; (2) making deceptive representations concerning GCU’s doctoral programs, in violation of § 5 of the FTC Act;

1 (3) making both sets of deceptive representations in connection with the telemarketing of
 2 educational services, in violation of the FTC’s Telemarketing Sales Rule (“TSR”);
 3 (4) initiating telemarketing calls to persons who requested that GCU not contact them, in
 4 violation of the TSR; and (5) initiating telemarketing calls to persons registered on the
 5 national Do-Not-Call Registry, in violation of the TSR. (*Id.*)

6 On February 9, 2024, GCU moved to dismiss. (Doc. 27.) Among other things,
 7 GCU argued that the FTC only possesses authority under the FTC Act and the TSR to
 8 pursue claims against “persons, partnerships, or corporations,” yet GCU is not a “person”
 9 or “partnership” and does not fall within the FTC Act’s definition of a “corporation,” which
 10 is limited to a company “organized to carry on business for its own profit or that of its
 11 members.” (*Id.* at 6-8.)

12 On July 30, 2024, the Court heard oral argument on GCU’s motion to dismiss (as
 13 well as on motions to dismiss by GCE and Mueller). (Doc. 57 [transcript].)

14 On August 15, 2024, the Court issued a lengthy order that, among other things,
 15 dismissed GCU as a defendant. (Doc. 56) As an initial matter, the Court agreed with GCU
 16 that, to fall within the FTC Act’s definition of a “corporation,” an entity must either be (1)
 17 organized to carry on business for the profit of its “members”; or (2) organized to carry on
 18 business for its “own” profit. (*Id.* at 16, 22-23.) The Court concluded that the FTC could
 19 not prevail under the former theory because “during oral argument, the FTC abandoned
 20 any claim that GCU is organized to profit its members.” (*Id.* at 22.) Thus, the analysis
 21 turned on whether the allegations in the complaint were sufficient to establish that GCU
 22 was organized to carry on business for its “own” profit.

23 As to that issue, “the FTC’s theory as clarified during oral argument [was] that if an
 24 ostensible nonprofit entity is being operated to benefit ‘insiders,’ ‘related . . . businesses,’
 25 or ‘officers’ that are not members, it qualifies as a company ‘organized to carry on business
 26 for its own profit’ within the meaning of” the FTC Act. (*Id.* at 22-23.) Although the Court
 27 acknowledged that the issue presented a debatable call, it rejected the FTC’s position, both
 28 because “no federal appellate court has ever, in a published opinion, allowed the FTC to

1 pursue claims against an ostensible nonprofit under this theory” and because “the FTC’s
 2 theory cannot be squared with the plain language of the statute.” (*Id.* at 23.) The Court
 3 elaborated:

4 If Congress had intended for [the statutory definition] to encompass
 5 nonprofit entities organized to carry on business for the profit of non-member
 6 “insiders,” “related businesses,” and “officers,” it could have said so. Indeed,
 7 other statutes addressing nonprofit status expressly call for such an inquiry.
 8 For example, the inurement clause of section 501(c)(3) of the Internal
 9 Revenue Code requires an evaluation of whether any “part of the net
 10 earnings” of an asserted nonprofit charity “inures to the benefit of any private
 11 shareholder or individual.” Similarly, under the DOE regulations, one part
 12 of the definition of the term “Nonprofit institution” is that “the Secretary
 13 determines that no part of the net earnings of the institution benefits any
 14 private entity or natural person.” But there is no textual basis for engaging
 15 in such an inquiry when determining whether an entity falls within [the FTC
 16 Act’s] definition of a “corporation.” Instead, for whatever reason, Congress
 17 chose only to vest the FTC with authority to pursue claims against an entity
 18 organized to carry on business for its “own” profit or the profit of its
 19 “members.” Although there may be persuasive policy reasons why the FTC
 20 should be allowed to pursue claims against nonprofits that operate for the
 21 benefit of non-member insiders, related businesses, and officers, the Court
 22 must take the statute as written.

23 (*Id.* at 23-24, cleaned up.) The Court also observed that the FTC’s proposed “interpretation
 24 effectively deletes the words ‘its own’ from the statute. . . . Even if GCU is somehow
 25 organized for Mueller’s and/or GCE’s profit, no facts have been pleaded suggesting it is
 26 organized for its ‘own’ profit.” (*Id.* at 24-25, cleaned up).

27 In the final portion of the August 15, 2024 order, the Court addressed whether the
 28 FTC should be granted leave to amend as to GCU. (*Id.* at 51.) The Court concluded that
 leave should be granted because “[t]he FTC has not previously amended the Complaint,
 the policy of extreme liberality underlying Rule 15(a) counsels in favor of granting the
 FTC’s amendment request, and it is at least theoretically possible that the deficiencies
 identified in . . . this order could be cured based on the pleading of additional facts.” (*Id.*)

On September 5, 2024, the FTC filed its operative pleading, the First Amended
 Complaint (“FAC”). (Doc. 62.) The FAC again names GCU as a defendant and reasserts

1 the same five causes of action that appeared in the original complaint. (*Id.*) The FAC also
2 includes, in paragraphs 13, 14, and 20, the following new allegations intended to establish
3 that GCU is organized for its “own” profit:

- 4 • Paragraph 13: “Gazelle University/GCU was organized to carry on the
5 business of selling educational services and related activities for its own
6 profit and for the profit of GCE. Gazelle University/GCU was organized to
7 acquire, own, and operate portions of the University owned by GCE, and use
8 at least some of its earnings from this business to acquire property, secure
9 loans, accumulate capital, and otherwise perpetuate and expand its business,
10 and to increase the assets of the corporation and their value. Accordingly,
11 Defendant Gazelle University/GCU was organized and has been operated to
12 carry on business for its own profit or that of its members, within the meaning
13 of Section 4 of the FTC Act. 15 U.S.C. § 44.” (Doc. 62-1 ¶ 13.)
- 14 • Paragraph 14: “The articles of incorporation of Gazelle University/GCU
15 represent that it is organized and operated exclusively for charitable,
16 religious, and scientific purposes within the meaning of Section 501(c)(3) of
17 the Internal Revenue Code. Notwithstanding these articles of incorporation,
18 Gazelle University/GCU was not organized exclusively for these purposes
19 or exclusively for its own profit. In fact, it was organized by GCE and
20 Defendant Mueller for Gazelle University/GCU’s own profit, and to advance
21 GCE’s for-profit business and advance Defendant Mueller’s interests as
22 officer, chairman, director, stockholder and promoter of investment in GCE.”
23 (*Id.* ¶ 14.)
- 24 • Paragraph 20: “Since July 1, 2018, GCU’s revenue has generated profit for
25 itself, for GCE, and for GCE’s investors. Since the July 1, 2018
26 reorganization of the University’s assets, GCU has also generated revenue
27 and profit. GCU has used its earnings to acquire property, accumulate
28 reserves and enhance the value of its assets, and has reportedly increased the

1 net value of its assets by more than \$125 million.” (*Id.* ¶ 20.)

2 On September 26, 2024, GCU again moved to dismiss. (Doc. 71.) The motion is
 3 now fully briefed. (Docs. 83, 85.)

4 On February 13, 2025, the Court issued a tentative ruling on GCU’s motion (as well
 5 as on two of the other motions being resolved in this order). (Doc. 137.)

6 On February 19, 2025, the Court heard oral argument. (Doc. 138.)

7 **B. The Parties’ Arguments**

8 GCU argues that the new factual allegations in the FAC do not cure the deficiencies
 9 that led to the dismissal of the original complaint. (Doc. 71.) First, GCU argues that any
 10 new allegations regarding how it has been “operated” are irrelevant because the statutory
 11 definition only addresses how an entity is “organized.” (*Id.* at 4-5.) Second, GCU argues
 12 that the FAC’s allegation that it was “organized . . . to perpetuate and expand its business”
 13 is unavailing because “nonprofits may grow their revenue and acquire new assets without
 14 undermining their nonprofit status.” (*Id.* at 5.) GCU also contends the FTC conceded this
 15 point during oral argument on the previous motion to dismiss. (*Id.* at 5-6.) Third, GCU
 16 argues that the FAC’s allegations regarding its efforts to acquire property, secure loans,
 17 and accumulate capital are unavailing because “the FTC does not allege that any of the
 18 perpetuation and expansion of GCU’s operations . . . was not in furtherance of GCU’s
 19 educational mission.” (*Id.* at 6.)

20 In response, the FTC argues that the new factual allegations in the FAC should be
 21 deemed sufficient to cure the deficiencies that led to the dismissal of the original complaint.
 22 (Doc. 83.) More specifically, the FTC contends that the new allegations in paragraphs 13,
 23 14, and 20 establish the following narrative:

24 [GCE], which owned and operated the University as a for-profit beginning
 25 in 2004, devised a plan to re-brand the University as a nonprofit by
 26 transferring some of its assets and operations to a new entity, created and
 27 headed by . . . Mueller. The purported nonprofit formed to implement this
 28 plan, initially named Gazelle University, was created so that it would acquire
 portions of the University from GCE. GCE would retain other portions of
 the University’s operations, continue to be the exclusive provider of

1 marketing for the business, and receive most of its income. Gazelle
 2 University/GCU was organized, the amended complaint alleges, so that both
 3 it and GCE could profit from this division of assets and operations. Gazelle
 4 University/GCU could use earnings from operating the University to ‘acquire
 5 property, secure loans, accumulate capital, and otherwise perpetuate and
 6 expand its business, and to increase the assets of the corporation and their
 7 value.’ At the same time, it also would advance GCE’s business, the interest
 8 of GCE’s investors, and the interests of Defendant Mueller as GCE’s CEO,
 9 Chairman, and stockholder.

10 (Id. at 1-2.) According to the FTC, these new allegations are not conclusory and establish
 11 “that Gazelle University/GCU was organized for its own profit, that it was not organized
 12 exclusively for charitable purposes, and that it has reportedly increased the net value of its
 13 assets by more than \$125 million.” (Id. at 3-4.) The FTC also contends that GCU’s
 14 arguments regarding “organized” versus “operated” amount to a straw man because the
 15 FAC specifically alleges that “GCU was operated *and* organized for its own profit.” (Id.
 16 at 4-5.) Finally, the FTC argues that GCU’s other arguments—including that it is
 17 permissible for a nonprofit to generate surplus earnings to be used to support its mission—
 18 effectively amount to requests to “insert requirements that have no basis in the FTC Act’s
 19 text.” (Id. at 5-6.)

20 In reply, GCU argues that “the FTC’s conclusory statement that GCU was
 21 ‘organized for its own profit’ is not a factual allegation entitled to the presumption of truth.
 22 The only new facts that the [FAC] alleges are that GCU has used its revenue to retire debt,
 23 acquire property, accumulate capital, build its reserves, increase the value of its assets, and
 24 expand or perpetuate the University. But those kinds of commonplace activities, which
 25 are undertaken by nonprofits throughout the country, in no way suggest that GCU has used
 26 its revenue to enrich itself, its member, or (non-existent) shareholders, as they are the kind
 27 entirely consistent with the nonprofit mission for which GCU was organized.” (Doc. 85 at
 28 1.) GCU also clarifies that it is not arguing that the improper use of revenues, in violation
 of a nonprofit’s articles of organization, is part of the statutory test for whether an entity
 qualifies as a “corporation”—rather, its position is that “a nonprofit does not meet the

1 statutory requirement . . . just because it perpetuates or expands itself as part of its nonprofit
 2 mission.” (*Id.* at 1-2, cleaned up.) Next, GCU reiterates that the FTC’s current position is
 3 inconsistent with the position the FTC took during the last oral argument. (*Id.* at 2.) GCU
 4 concludes: “[T]he FTC now abandons any discernable limiting principle, taking a stance
 5 that would give it authority over virtually every thriving nonprofit. To be sure, what the
 6 FTC alleges in the First Amended Complaint’s new paragraphs are sound financial
 7 principles for nonprofit universities. But the mere fact that a non-profit is earning revenue
 8 and expanding does not transform it into a for-profit. No federal court has ever adopted
 9 such a broad reading of the FTC Act’s definition of a corporation, which would eviscerate
 10 § 4’s limiting language and give the FTC authority over all manner of nonprofit entities.”
 11 (*Id.* at 2-4, citations omitted.)

12 C. **Analysis**

13 During oral argument, the FTC clarified that the new allegations in the FAC are
 14 intended to establish that GCU was organized for two, and only two, purposes: (1) to carry
 15 on business to generate profit for GCE, GCE’s investors, and Mueller (none of whom are
 16 members of GCU); and (2) to carry on business for GCU’s “own” profit.¹ But as discussed
 17 in the August 15, 2024 order, the first alleged purpose is insufficient to satisfy the definition
 18 of “corporation” established in § 4 of the FTC Act. (Doc. 56 at 24 [“Congress chose only
 19 to vest the FTC with authority to pursue claims against an entity organized to carry on
 20 business for its ‘own’ profit or the profit of its ‘members.’ Although there may be
 21 persuasive policy reasons why the FTC should be allowed to pursue claims against
 22 nonprofits that operate for the benefit of non-member insiders, related businesses, and
 23 officers, the Court must take the statute as written.”].)

24

25 ¹ In the tentative ruling issued before oral argument, the Court construed the FAC as
 26 alleging that one of GCU’s organizational purposes—albeit not the sole purpose—was to
 27 advance GCU’s stated charitable mission of providing educational services. (Doc. 137 at
 28 9-10.) During oral argument, the FTC disagreed with this interpretation, which it attributed
 to the improper application of a heightened pleading standard, and clarified that the FAC
 should be construed as alleging that “GCU was organized for the two purposes identified
 in paragraph 13, namely, for the profit of GCU and for the profit of GCE and Mueller.”
 The analysis here has been significantly revised to reflect that clarified position.

1 As for the second alleged purpose, the FAC does, indeed, assert that “GCU was
 2 organized to carry on the business of selling educational services and related activities for
 3 its own profit” (Doc. 62 ¶ 13) and then repeats the phrase “for its own profit” several more
 4 times (*id.* ¶¶ 13, 14). However, these assertions simply amount to the repetition of a legal
 5 conclusion. “[T]he tenet that a court must accept as true all of the allegations contained in
 6 a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a
 7 cause of action, supported by mere conclusory statements, do not suffice.” *Ashcroft v.*
 8 *Iqbal*, 556 U.S. 662, 678 (2009). Instead, the Court must (1) identify the actual *facts*
 9 alleged in the FAC; and (2) determine whether those facts, accepted as true, make it
 10 plausible that GCU was organized to carry on business for its “own” profit. *Id.* at 679
 11 (“[A] court considering a motion to dismiss can choose to begin by identifying pleadings
 12 that, because they are no more than conclusions, are not entitled to the assumption of truth.
 13 While legal conclusions can provide the framework of a complaint, they must be supported
 14 by factual allegations. When there are well-pleaded factual allegations, a court should
 15 assume their veracity and then determine whether they plausibly give rise to an entitlement
 16 to relief.”).

17 The first part of the analysis is straightforward. The relevant factual allegations in
 18 the FAC are that GCU was organized to “carry on the business of selling educational
 19 services and related activities”; that those business activities generate “earnings”; and that
 20 those earnings are used in part to “otherwise perpetuate and expand [GCU’s] business” by
 21 acquiring property, securing loans, and accumulating assets that have “reportedly increased
 22 [in value] by more than \$125 million.” (Doc. 62 ¶¶ 13-14, 20.)

23 The second part of the analysis is more complicated. To assess the sufficiency of
 24 those factual allegations, it is necessary to identify what, exactly, it means for an entity to
 25 operate for its “own profit.” The FTC’s theory as to that issue, as clarified during oral
 26 argument, is that the meaning of the phrase “own profit” in § 4 of the FTC Act is not
 27 “limited to a context where there are dividends paid or there are earnings paid to another
 28 owner” and instead more broadly encompasses any situation in which an entity is able to

1 “thrive” through the reinvestment of surplus earnings: “The allegations in the complaint
 2 are that this [structure] was created so that both [GCU and GCE] could thrive, both would
 3 receive surplus, and both would profit in that sense.” During a different portion of oral
 4 argument, the FTC restated its theory as follows: “[A]s a general matter, if a nonstock
 5 corporation is permitted to use its net surplus revenues to grow the business, to grow its
 6 balance sheet, to grow its activities, that entity is operating for its own profit.”

7 As an initial matter, it is difficult to reconcile the FTC’s theory with the position it
 8 took during the oral argument on GCU’s earlier motion to dismiss. There, the FTC stated
 9 that if GCU was generating “surplus earnings” and then using all of that money “for
 10 legitimate educational purposes” such as “expansion,” this would *not* qualify as proof that
 11 GCU was operating for its “own” profit:

12 Q: [I]s it your theory that anytime that a university uses its revenues to
 13 expand, it’s no longer a nonprofit because it’s operating for its own
 14 profit through its expansion?

15 A: No, Your Honor. It is that if those activities are in advancement of its
 16 educational mission, then that is not for profit. It has to be faithful to
 17 the commitment to use the surplus earnings exclusively for the
 charitable purposes.

18 Q: So . . . where in the complaint does it allege that the subset of the
 19 revenue that GCU keeps for itself GCU uses for some purpose other
 than legitimate educational purposes?

20 A: Your Honor, that is not the test. So let me go back. The point is that
 21 if GCU is using the subset of what it retains for legitimate educational
 22 purposes, that’s fine, but it needs to be 100 percent.

23 (Doc. 57 at 33-34.)

24 This colloquy is notable because the new allegations in the FAC resemble the
 25 scenario addressed during the last oral argument. In both cases, GCU generates surplus
 26 earnings through the same conduct—the sale of educational services and related activities.
 27 Additionally, in both cases, GCU uses at least some of those surplus earnings to pay for its
 28 own expansion and self-perpetuation. Nevertheless, although the FTC previously stated

1 that GCU’s use of all of its surplus earnings to pay for its expansion and self-perpetuation
 2 would be “not for profit,” the FTC now seeks to characterize GCU’s use of a portion of its
 3 surplus earnings to pay for its expansion and self-perpetuation as activity for GCU’s “own
 4 profit.” (*See also* Doc. 83 at 2 [“The amended complaint alleges that both GCU and GCE
 5 have profited from the restructuring, as GCU has used earnings to acquire property and
 6 improve its balance sheet, while also directing revenue to GCE and its investors.”].)

7 Although the FTC is not precluded from seemingly changing its position in this
 8 fashion—the Ninth Circuit “has restricted the application of judicial estoppel to cases
 9 where the court relied on, or ‘accepted,’ the party’s previous inconsistent position,”
 10 *Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778, 783 (9th Cir. 2001)—the FTC’s
 11 current theory is still untenable.² During follow-up questioning, the FTC acknowledged
 12 that its theory would place no limit on its ability to pursue claims against ostensible
 13 nonprofit entities that generate surplus earnings. For example, when asked “what would
 14 stop the FTC from bringing a suit against any educational institution, even one that doesn’t
 15 have an arrangement like this with GCE where some of the profits flow to GCE?”, the FTC
 16 answered: “[U]nder your analysis, there is no backstop to that.” The absence of such a
 17 backstop is a strong indication that the FTC’s theory is flawed. Indeed, at least one court
 18 has expressly rejected that theory. *Community Blood Bank of Kansas City Area, Inc. v.*
 19 *FTC*, 405 F.2d 1011, 1016 (8th Cir. 1969) (“The interpretation of the Commission means,
 20 of course, that any corporation engaged in business only for charitable purposes and which
 21 is forbidden by law to carry on business for profit, that receives income in excess of
 22 expenses, is in fact carrying on business for its own profit if it is capable of self-
 23 perpetuation or expansion. Neither the legislative history of the Act nor the language of
 24 § 4 supports the Commission’s theory that Congress intended that ‘profit’ is to be given
 25

26 During the most recent oral argument, the FTC stated that it had not changed its
 27 position and argued that its representations during the earlier oral argument were only
 28 offered “in the context of explaining the earlier complaint.” Although the Court does not
 find this purported distinction persuasive, it ultimately does not matter whether there was
 a change in position. As discussed, the outcome here is not based on principles of
 estoppel—the Court has considered the FTC’s new/clarified theory on the merits.

different meanings depending upon the character of the corporation under consideration. Additionally, the strained interpretation of the Commission runs counter to the principle that Congress will be presumed to have used a word in its usual and well-settled sense.”) (cleaned up). More broadly, courts have assumed—contrary to FTC’s “no backstop” theory—that § 4 places at least *some* limits on the FTC’s authority under the FTC Act to pursue claims against ostensible nonprofit entities, even if courts have not conclusively identified the extent of those limits. *See, e.g., National Federation of the Blind v. FTC*, 420 F.3d 331, 334 (4th Cir. 2005) (“The FTCA gives the FTC jurisdiction over ‘persons, partnerships, or corporations,’ with some exceptions not relevant here. An entity is only a ‘corporation,’ for FTCA purposes, if it is ‘organized to carry on business for its own profit or that of its members.’ Thus, according to the FTC’s organic statute, non-profit organizations fall outside the scope of the agency’s jurisdiction.”); *FTC v. University Health, Inc.*, 938 F.2d 1206, 1217 n.23 (11th Cir. 1991) (referring to “the fact that the FTC has no jurisdiction under the FTCA to regulate nonprofit corporations”); *Community Blood Bank*, 405 F.2d at 1017 (“Congress did not intend to provide a blanket exclusion of *all* nonprofit corporations”) (emphasis added). On the other side of the ledger, the FTC has tellingly failed to identify any judicial decision agreeing that it has authority under § 4 of the FTC Act to pursue claims against any ostensible nonprofit entity that happens to generate surplus earnings that may be used for expansion or self-perpetuation.³

In addition to lacking a discernable limiting principle, the FTC’s theory is also flawed for other reasons. For the FTC to prevail, the Court would need to find that GCU’s first alleged organizational purpose of generating surplus earnings for its own expansion (which does not inherently qualify as activity for GCU’s “own” profit for the reasons stated above) becomes so when coupled with GCU’s other alleged organizational purpose of generating profits for GCE, GCE’s investors, and Mueller (which does not qualify as

³ As noted in the August 15, 2024 order, the Supreme Court has expressly declined to reach this issue: “[W]e do not, and indeed, on the facts here, could not, decide today whether the Commission has [authority] over nonprofit organizations that do not confer profit on for-profit members but do, for example, show annual income surpluses” *Cal. Dental Association v. FTC*, 526 U.S. 756, 767 n.6 (1999).

1 activity for GCU’s “own” profit for the reasons stated in the August 15, 2024 order). But
 2 such a conclusion would be logically incoherent. *Henderson v. Kennedy*, 253 F.3d 12, 19
 3 (D.C. Cir. 2001) (“For this argument to prevail, one would have to conclude that . . . the
 4 combination of two untenable claims equals a tenable one. But in law as in mathematics
 5 zero plus zero equals zero.”). The bottom line is that the only entities and individuals who
 6 stand to profit from GCU’s expansion are GCE, GCE’s investors, and Mueller. GCU’s
 7 expansion simply enhances its ability to generate future surplus earnings, which may then
 8 be used for additional expansion or as further profit for GCE, GCE’s investors, and
 9 Mueller. In other words, all roads eventually lead to profit for GCE, GCE’s investors, and
 10 Mueller. Thus, the FAC’s allegation that GCU was organized in part for its “own” profit
 11 is just a roundabout way of alleging that GCU was organized to generate profit for those
 12 entities and individuals—an allegation that fails to state a claim for the reasons stated in
 13 the August 15, 2024 order.⁴

14 For these reasons, GCU is again dismissed. This dismissal is without leave to
 15 amend, as any further attempt at amendment would be futile.

16 II. GCU’s Motion To Quash And/Or For Protective Order

17 A. **Relevant Background**

18 During the early stages of this case, all Defendants sought a stay of discovery until
 19 the Court resolved their respective motions to dismiss. (Doc. 47 at 10-12.) On April 10,
 20 2024, after hearing argument on that issue, the Court granted the stay request. (Doc. 51.)

21 As noted, on August 15, 2024, the Court issued a lengthy order resolving the
 22 motions to dismiss. (Doc. 56.) Although that order resulted in the dismissal of GCU, the
 23 Court did not wholly grant GCE’s and Mueller’s dismissal requests. (*Id.*) As a result, the
 24

25 ⁴ In a related vein, although the FTC emphasizes that generating profit for GCE,
 26 GCE’s investors, and Mueller is inconsistent with being “organized exclusively for the
 27 educational purposes [GCU] has represented” (Doc. 83 at 6, citing Doc. 62 ¶ 13), the
 28 analysis under § 4 of the FTC Act doesn’t turn on whether an entity has misstated its true
 organizational purpose in its articles of incorporation. Instead, as both sides previously
 agreed (Doc. 56 at 18), the analysis turns on whether the entity is, in fact, “organized to
 carry on business for its own profit or that of its members.” For all the reasons stated
 above, the FTC has failed to allege facts that make such a claim plausible.

1 Court ordered that “[t]he stay on discovery . . . is lifted.” (*Id.* at 52.)

2 As noted, on September 5, 2024, the FTC filed the FAC, which again named GCU
3 as a defendant. (Doc. 62.)

4 On September 23, 2024, the Court held a renewed case management conference.
5 (Doc. 69.) During that conference, GCU’s counsel made an oral motion to stay discovery
6 as to GCU pending the resolution of GCU’s forthcoming motion to dismiss the FAC. (*Id.*)
7 The Court granted that stay request. (*Id.*)

8 On December 2, 2024, the FTC issued a Rule 45 subpoena directed to the law firm
9 Cooley, LLP (“Cooley”). (Doc. 117-1.) As background, Cooley “represented GCU as
10 regulatory counsel in connection with the July 1, 2018 acquisition of [GCU] from GCE
11 and GCU’s change-in-ownership application with the Department of Education.” (Doc.
12 117 at 2.) The subpoena seeks to compel Cooley to produce three categories of documents
13 associated with those processes: “1. Documents sent to and received from the United States
14 Department of Education. 2. Documents sent to and received from the Higher Learning
15 Commission, or Arizona State Board for Private Postsecondary Education. 3. Documents
16 sent to and received from Deloitte Tax LLP, Barclays Capital Inc., or other entities that
17 Jonathan Glass did not represent as an attorney in connection with this matter and was not
18 acting as agent for an entity with whom Jonathan Glass had an attorney-client relationship.”
19 (Doc. 117-1 at 5.)

20 Between December 13-23, 2024, counsel for GCU and the FTC met and conferred
21 regarding the Cooley subpoena. (Doc. 117-2.)

22 On December 23, 2024, after GCU and the FTC were unable to resolve their dispute
23 informally, GCU filed the pending motion to quash and/or for protective order. (Doc. 117.)

24 On January 13, 2025, the FTC filed a response. (Doc. 125.)

25 On January 24, 2025, GCU filed a reply. (Doc. 131.)

26 **B. The Parties’ Arguments**

27 GCU moves to quash the Cooley subpoena or for a protective order to block
28 enforcement of the Cooley subpoena. (Doc. 117.) First, GCU argues that the Cooley

1 subpoena constitutes an impermissible attempt “to circumvent this Court’s order staying
2 discovery against GCU.” (*Id.* at 4.) More specifically, GCU contends that because
3 “documents related to a law firm’s representation of a client are within the client’s
4 possession, custody, and control, *i.e.*, Cooley’s potentially responsive documents are
5 GCU’s documents for purposes of discovery,” it follows that the subpoena will force GCU
6 “to incur the burden and cost of responding to the subpoena, just as if it were issued to
7 GCU directly.” (*Id.* at 4-5.) Second, GCU argues that the documents sought by the Cooley
8 subpoena are irrelevant because Count One of the FAC turns on whether “students may
9 have been misled by Defendants’ characterization of GCU as a non-profit” and the
10 requested documents will shed no light on that issue. (*Id.* at 5-6.) GCU further contends
11 that the Cooley subpoena represents a backdoor attempt by the FTC to obtain information
12 that could be used to “collaterally attack[]” the regulatory decisions of certain agencies and
13 is particularly misplaced in light of the Ninth Circuit’s recent decision in *Grand Canyon*
14 *Univ. v. Cardona*, 121 F.4th 717 (9th Cir. 2024), which ordered the Department of
15 Education to set aside its denials of GCU’s applications to be recognized as a nonprofit
16 institution under the Higher Education Act of 1965. (*Id.* at 6-7). GCU also contends that
17 at least some of the requested documents “are largely available in public filings in” the
18 *Cardona* lawsuit. (*Id.* at 7.) Third, GCU argues that complying with the Cooley subpoena
19 would place an undue burden on GCU because the FTC already possesses most of the
20 documents covered by the first two categories of the subpoena and the third category
21 encompasses documents “that will require significant review for privilege and
22 confidentiality.” (*Id.* at 7-9.)

23 The FTC opposes GCU’s motion. (Doc. 125.) In response to GCU’s contention
24 that the Cooley subpoena represents an attempt to circumvent the stay, the FTC argues that
25 the stay “does not bar discovery from others pursuant to Rule 45 or other means as the FTC
26 prepares to litigate the claims for which this Court has already rejected motions to dismiss.
27 The records covered by the subpoena are discoverable, regardless of whether GCU remains
28 a party to this suit, as they are relevant to whether Defendants GCE and Mueller are liable

1 for marketing GCU as a nonprofit. Indeed, even if GCU was not a party, its non-party
2 status would not allow it to block discovery because it claimed an interest in the records.”
3 (*Id.* at 4-5.) The FTC also disputes the notion that the subpoena is effectively directed to
4 GCU, arguing that “a subpoena for these documents is not transformed into discovery
5 ‘against GCU’ because counsel for GCU also possesses copy of these records. The
6 subpoena seeks Cooley’s communications; records for which Cooley is the original
7 source—not merely a custodian. As counsel in GCU’s dealings with the Department of
8 Education, HLC, and State of Arizona, Cooley was the author and original recipient of
9 many of the documents exchanged. The fact that GCU also happens to have a copy of the
10 documents does not invalidate an otherwise valid subpoena.” (*Id.* at 5-6.) In response to
11 GCU’s relevance arguments, the FTC argues that “[d]ocuments describing the terms, plans
12 and goals of the creation of ‘New GCU’ are relevant to the FTC’s claims that the terms,
13 plans and goals show it is deceptive to represent that the University is a nonprofit. Thus,
14 relevance does not turn on whether the records may confirm allegations that false
15 representations were made.” (*Id.* at 11.) The FTC also argues that “this Court has already
16 rejected arguments that IRS and other agency characterizations are dispositive of the
17 nonprofit claims in this case” and that “nothing in the recent Ninth Circuit decision
18 undermines this Court’s prior ruling on the motion to dismiss. To the contrary, the Ninth
19 Circuit’s remand underscores that whether GCU is a genuine nonprofit is an open question
20 to be litigated, and is not governed by prior actions of the IRS or any other agency.” (*Id.*
21 at 9-11.) In response to GCU’s undue burden arguments, the FTC contends it is
22 “questionable” whether GCU, as a non-recipient, has standing to raise such arguments. (*Id.*
23 at 6 n.4.) Regardless, the FTC contends those arguments fail on the merits because Cooley
24 only possesses approximately 3,800 documents (so the scope of review will be limited),
25 the subpoena only seeks third-party communications, and even if some subset of those
26 documents might theoretically be covered by some privilege or the work-product doctrine,
27 “GCU makes no showing that the volume of such records is significant or that privilege or
28 work product protections apply.” (*Id.* at 6-7.) In a later section of its brief, the FTC

1 elaborates on why it believes GCU’s references to privilege doctrines are too vague and
 2 conclusory. (*Id.* at 11-13.) Finally, the FTC also contends that, for various reasons, the
 3 requested documents are not duplicative of documents already in its possession and are not
 4 included in the publicly available portions of the *Cardona* docket. (*Id.* at 7-9.)

5 In reply, GCU begins by reiterating its contention that, particularly in light of
 6 *Cardona*, none of the materials sought in the Cooley subpoena are relevant. (Doc. 131 at
 7 1-4.) GCU also reiterates its contention that the Cooley subpoena represents an attempt to
 8 circumvent the stay because “[f]unctionally, the Cooley subpoena is no different than if the
 9 FTC served discovery requests directly on GCU.” (*Id.* at 4-5.) GCU does not directly
 10 respond to most of the FTC’s undue burden arguments, which it characterizes as
 11 distractions intended “to shift this Court’s focus away from the larger, preceding point”
 12 concerning relevance. (*Id.* at 5.)

13 **C. Analysis**

14 GCU has not established an entitlement to the relief sought in its motion. As an
 15 initial matter, the Cooley subpoena does not represent an impermissible attempt to
 16 circumvent the September 23, 2024 order staying discovery as to GCU. The purpose of
 17 that order was simply to protect GCU from the potential burdens of *party* discovery
 18 pending resolution of the parties’ dispute over whether GCU is a proper party to this action.
 19 It was not intended to forever preclude the FTC from pursuing discovery from any source
 20 bearing on the accuracy of Defendants’ characterization of GCU as a nonprofit, which is
 21 relevant to the FTC’s claim in Count One of the FAC.

22 In fact, there is a certain irony to GCU’s position now that it has been dismissed as
 23 a party. *See Part I supra.* Although that dismissal frees GCU from the burdens of party
 24 discovery, GCU (now a non-party) is nevertheless seeking to insert itself into a dispute
 25 concerning a subpoena issued to Cooley (another non-party) in an effort to raise relevance
 26 and undue burden objections. There is a strong argument that GCU lacks standing to raise
 27 such objections under these circumstances. For example, under Rule 26(c), “[a] party or
 28 any person from whom discovery is sought may move for a protective order,” but GCU is

1 no longer a party and is not the person from whom discovery is being sought. *See also* 1
 2 Gensler, Federal Rules of Civil Procedure, Rules and Commentary, Rule 26 (2024) (“A
 3 motion for a protective order may be filed by (1) any party; or (2) the person from whom
 4 discovery is sought. . . . When discovery threatens the interests of nonparties who are not
 5 the targets of the discovery, those nonparties do not fall within the scope of Rule 26(c)
 6 because they are neither parties nor persons from whom discovery is sought.”) (emphasis
 7 omitted). Meanwhile, under Rule 45, “the prevailing view is that . . . a *non-recipient party*
 8 cannot move to quash or modify a subpoena on relevance, cost, or proportionality
 9 grounds.” Gensler, *supra*, Rule 45 (emphasis added). *See also Anstead v. Va. Mason Med.*
 10 *Ctr.*, 2023 WL 34505, *2 (W.D. Wash. 2023) (“This Court agrees with other district courts
 11 in the Ninth Circuit that a party generally lacks standing to object to a subpoena served on
 12 a third party on grounds of relevance or undue burden.”); *Thao v. Lynch*, 2023 WL
 13 2480860, *2 (E.D. Cal. 2023) (the “general rule” is that a party “lacks standing to object
 14 to [third-party] subpoenas on grounds of relevance or undue burden”); *Jiae Lee v. Dong*
 15 *Yeoun Lee*, 2020 WL 7890868, *5 (C.D. Cal. 2020) (“[O]nly the party to which the
 16 subpoena is directed has standing to object to the requests on the grounds that they are
 17 irrelevant, vague, overbroad, duplicative, unduly burdensome, etc.”). That rule would
 18 seem to apply with particular force where, as here, it is a *non-recipient non-party* that seeks
 19 to raise relevance and undue burden objections to a subpoena.⁵

20 Nevertheless, even assuming GCU possesses standing to raise those objections, they
 21 fail on the merits. Starting with relevance, “[r]elevancy in civil litigation is a relatively
 22

23 ⁵ GCU’s current status as a non-recipient non-party also distinguishes this case from
 24 *Blotzer v. L-3 Communications Corp.*, 287 F.R.D. 507 (D. Ariz. 2012), which GCU cited
 25 during oral argument. There, the court granted a motion to quash/motion for protective
 26 order sought by one of the existing parties. To be clear, to the extent GCU has privilege
 27 claims related to the documents sought in the Cooley subpoena, it has standing to raise
 28 such claims notwithstanding its status as a non-party non-recipient. Gensler, *supra*, Rule
 45 (“[S]ome other person or party may have standing to challenge a subpoena directed at
 a nonparty if the challenging person or party is seeking to protect a personal privilege or
 right. For example, when a subpoena seeks documents that contain information protected
 by a privacy right or a privilege, the person whose right or privilege is in jeopardy may file
 a motion to quash even though the subpoena is directed to the custodian of those records.”).
 The point is simply that the right to assert a claim of privilege is not the same thing as the
 right to assert objections based on relevance or undue burden.

1 low bar.” *Continental Circuits LLC v. Intel Corp.*, 435 F. Supp. 3d 1014, 1018 (D. Ariz.
 2 2020).⁶ Under Rule 26(b)(1), “[p]arties may obtain discovery regarding any nonprivileged
 3 matter that is relevant to any party’s claim or defense and proportional to the needs of the
 4 case, considering the importance of the issues at stake in the action, the amount in
 5 controversy, the parties’ relative access to relevant information, the parties’ resources, the
 6 importance of the discovery in resolving the issues, and whether the burden or expense of
 7 the proposed discovery outweighs its likely benefit.” *See also Gensler, supra*, Rule 26
 8 (“For discovery purposes, courts define relevance broadly, stating that information is
 9 relevant if it bears on or might reasonably lead to information that bears on any material
 10 fact or issue in the action. . . . [C]ourts are quick to point out that discovery is concerned
 11 with relevant information—not relevant evidence—and that as a result the scope of
 12 relevance for discovery purposes is necessarily broader than trial relevance.”).

13 As explained in the August 15, 2024 order, the merits of Count One will ultimately
 14 turn on whether the “characterization of GCU as a nonprofit was confusing to students and
 15 the public.” (Doc. 56 at 32.) “Although the parties may dispute what it means to meet the
 16 legal definition of a ‘nonprofit’ in various contexts . . . what the parties, agencies, or this
 17 Court understand that term to mean does not necessarily determine how consumers would
 18 interpret Defendants’ marketing.” (*Id.*) Thus, one way the FTC may attempt to establish
 19 consumer confusion in this case is by showing that consumers’ understanding of the term
 20 “nonprofit” differs from the reality of how GCU was structured. Even though the
 21 documents sought in the Cooley subpoena do not directly address the first part of this
 22 inquiry (consumer perception),⁷ they are still relevant to the second part of the inquiry

23 ⁶ During oral argument, GCU’s counsel asked the Court to confine its analysis to the
 24 issue of standing if inclined to rule against GCU on that basis. The Court respectfully
 25 disagrees with this request—because the issue of standing is debatable, the most efficient
 course of action is to also reach the parties’ other arguments bearing on the enforceability
 of the Cooley subpoena.

26 ⁷ During oral argument, GCU’s counsel accused the FTC of “essentially
 27 stonewall[ing]” as to the first part of this inquiry, by refusing to disclose its theory of how
 28 consumers understand the term “nonprofit,” and suggested that these stonewalling tactics
 provide another reason for disallowing the Cooley subpoena. However, based on
 subsequent questioning, it appears that the FTC’s discovery responses on this topic are
 either not yet due or are the subject of ongoing meet-and-confer efforts. Regardless, the

1 (GCU’s structure). In particular, the representations that GCU’s counsel made to various
 2 regulatory agencies and third-party consultants concerning GCU’s nonprofit status and
 3 structure are relevant in assessing GCU’s actual structure.

4 Turning to undue burden, although GCU suggests it would be required to engage in
 5 a “significant” and “substantial” privilege-review process if Cooley were required to
 6 comply with the subpoena (Doc. 117 at 8), GCU does not actually identify the number of
 7 documents at issue or attempt to substantiate, in anything other than conclusory and
 8 conditional terms, the nature of the privileges that could be implicated by a subpoena that
 9 only seeks communications between Cooley and various third parties: “While the request
 10 seeks communications with third parties, those communications *could* nonetheless be
 11 subject to attorney client, work-product, and common interest privileges.” (*Id.*, emphasis
 12 added.) Moreover, after the FTC argued in its response that the subpoena only
 13 encompasses 3,800 documents, most of which could not possibly raise any privilege or
 14 work-product issues, GCU did not dispute these points in its reply and simply fell back on
 15 its relevance objection (which lacks merit, for the reasons discussed above). Under these
 16 circumstances, even assuming GCU has standing to raise an undue burden objection to the
 17 subpoena or otherwise raise objections based on privilege and confidentiality, it has not
 18 adequately substantiated those objections in a manner that would justify quashing the
 19 subpoena under Rule 45 or otherwise blocking the subpoena through the issuance of a Rule
 20 26(c) protective order. *Phillips ex rel. Estates of Byrd v. Gen. Motors Corp.*, 307 F.3d
 21 1206, 1210-11 (9th Cir. 2002) (“For good cause to exist, the party seeking protection bears
 22 the burden of showing specific prejudice or harm will result if no protective order is
 23 granted.”).⁸

24 remedy for any alleged stonewalling would be to move to compel as to the missing
 25 discovery, not to withhold related discovery.

26 The Court clarifies that nothing in this order precludes Cooley or GCU from
 27 attempting to withhold otherwise responsive documents based on the good-faith assertion
 28 of a claim of privilege—GCU has simply not established an entitlement to the relief sought
 in its motion, which is to quash or otherwise categorically block enforcement of the
 subpoena. *Cf. Louisiana Corral Mgmt., LLC v. Axis Surplus Ins. Co.*, 650 F. Supp. 3d 491,
 502 (E.D. La. 2023) (“Axis lacks standing to object on behalf of the non-parties based on
 insufficient compliance time. Axis does, however, have standing to object based on its

1 **III. The FTC's Motion To Strike Affirmative Defenses**

2 **A. Relevant Background**

3 On September 26, 2024, GCE filed its answer to the FAC. (Doc. 73.) GCE's answer
4 also raises various affirmative defenses, two of which are discussed in more detail below.

5 On November 25, 2024, Mueller filed his amended answer to the FAC. (Doc. 100.)
6 Mueller's amended answer also raises various affirmative defenses, two of which are
7 discussed in more detail below.

8 On January 10, 2025, the FTC filed a motion to strike the challenged affirmative
9 defenses. (Doc. 124.)

10 On January 24, 2025, GCE (Doc. 130) and Mueller (Doc. 132) each filed a response.

11 On February 1, 2025, the FTC filed a reply. (Doc. 134.)

12 **B. Legal Standard**

13 “In the past few years, . . . the district courts have wrestled with whether the pleading
14 standards that apply to claims under Rule 8(a)(2), as set out in *Twombly* and *Iqbal*, also
15 apply to the pleading of affirmative defenses under Rule 8(c).” Gensler, *supra*, Rule 8.
16 “The Supreme Court has not addressed this question, and the lower courts are divided.”
17 Gensler, *supra*, Rule 12. “[O]nly the Second Circuit has explicitly addressed this issue at
18 the appellate level, holding that ‘the plausibility standard of *Twombly* applies to
19 determining the sufficiency of all pleadings, including the pleading of an affirmative
20 defense, but with recognition that, as the Supreme Court explained in *Iqbal*, applying the
21 plausibility standard to any pleading is a ‘context-specific’ task.’” Gensler, *supra*, Rule 8
22 (quoting *GEOMC Co., Ltd. v. Calmare Therapeutics Inc.*, 918 F.3d 92, 98 (2d Cir. 2019)).
23 Acknowledging the unsettled nature of this issue,⁹ the Court agrees with the Second

24 personal interest in documents protected by attorney-client privilege and/or work product.
25 Not every communication with counsel, however, falls within the attorney-client privilege,
26 nor is every document created after litigation is anticipated protected by the work-product
27 doctrine, particularly when prepared in the ordinary course of business. Although Axis has
28 failed to provide the required affidavit or other evidence necessary to establish work
product protection in this motion, Axis will be allowed to review the subpoenaed materials
and provide a proper privilege log with regard to any document withheld on the basis of
privilege or work product.”).

⁹ As Mueller's counsel correctly noted during oral argument, this Court previously

1 Circuit's approach. Thus, "[t]he standard for striking an affirmative defense . . . is
 2 effectively the same as for granting a motion under Rule 12(b)(6)." Gensler, *supra*, Rule
 3 12.¹⁰

4 Under Rule 12(b)(6), "to survive a motion to dismiss, a party must allege sufficient
 5 factual matter, accepted as true, to state a claim to relief that is plausible on its face." *In re*
 6 *Fitness Holdings Int'l, Inc.*, 714 F.3d 1141, 1144 (9th Cir. 2013) (internal quotation marks
 7 omitted). "A claim has facial plausibility when the plaintiff pleads factual content that
 8 allows the court to draw the reasonable inference that the defendant is liable for the
 9 misconduct alleged." *Id.* (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). "[A]ll
 10 well-pleaded allegations of material fact in the complaint are accepted as true and are
 11 construed in the light most favorable to the non-moving party." *Id.* at 1444-45 (citation
 12 omitted). However, the court need not accept legal conclusions couched as factual
 13 allegations. *Iqbal*, 556 U.S. at 678-80. Moreover, "[t]hreadbare recitals of the elements of
 14 a cause of action, supported by mere conclusory statements, do not suffice." *Id.* at 678.
 15 The court also may dismiss due to "a lack of a cognizable legal theory." *Mollett v. Netflix,*
 16 *Inc.*, 795 F.3d 1062, 1065 (9th Cir. 2015) (citation omitted).

17 C. **GCE's Sixth Affirmative Defense (Offset)**

18 1. The Parties' Arguments

19 GCE's sixth affirmative defense provides as follows: "Any monetary relief to which
 20 the FTC may be entitled, in whatever form, is subject to offset by amounts previously paid
 21 to regulatory agencies related to the same conduct." (Doc. 73 at 31.)

22 observed that "whether *Twombly* and *Iqbal* apply to affirmative defenses is an open
 23 question" and that "[t]he 'strong trend' is that *Twombly* and *Iqbal* do not apply." *Guanzon*
 24 *v. Vixxo Corp.*, 2020 WL 619695 (D. Ariz. 2020). Nevertheless, having now more fully
 25 considered the issue (as well as the intervening legal developments since *Guanzon* was
 26 issued), the Court concludes that the plausibility standard applies in this context.

27 ¹⁰ Given this standard, the FTC need not establish prejudice in order to prevail on its
 28 motion to strike. See, e.g., *G & G Closed Cir. Events, LLC v. Alfaro*, 2023 WL 1803399,
 *3 (E.D. Cal. 2023) ("[N]o published Ninth Circuit authority requires a showing of
 prejudice to strike affirmative defenses . . . [so] the Court declines to require Plaintiff to
 show prejudice where such a requirement is not found in Rule 12(f."); *FTC v. AMG Servs., Inc.*,
 2014 WL 5454170, *9 (D. Nev. 2014) ("Prejudice considerations are not relevant
 under Rule 12(f.").")

1 The FTC argues this affirmative defense should be stricken because it “is too vague
2 to provide fair notice and lacks legal basis. When previously challenged to explain this
3 defense, GCE did not identify any previous payments and, instead, argued that *future*
4 payments arising from a proposed Department of Education fine of GCU might give rise
5 to a defense. GCE’s description of a single example of a potential payment that is not
6 consistent with the defense it has pled underscores that the defense fails to provide adequate
7 notice and should be stricken.” (Doc. 124 at 6.) The FTC adds: “Neither the statute nor
8 case law provide that FTC Act remedies are subject to offset for fees or other amounts that
9 are not refunds.” (*Id.* at 7.) Finally, the FTC also contends that “a defense predicated on
10 conjecture that a future event in another proceeding may have a collateral impact is not a
11 current defense.” (*Id.* at 8.)

12 In response, GCE defends the sufficiency of its offset-related affirmative defense.
13 (Doc. 130 at 3-11.) First, GCE argues that the affirmative defense, as pleaded, provides
14 adequate notice and that the FTC’s arguments to the contrary are “disingenuous” in light
15 of GCE’s further elaboration of the nature of this affirmative defense during the parties’
16 meet-and-confer discussions. (*Id.* at 3-5.) Second, GCE argues that “it is no basis to strike
17 an affirmative defense simply because facts not known or present today may develop
18 through the pendency of the litigation and bear on the merits of the defense.” (*Id.* at 5-6.)
19 Third, GCE argues that maintaining its offset-related affirmative defense would not result
20 in “wasteful and distracting inquiries” because the FTC’s theory of liability here and the
21 Department of Education’s threatened fine are both based on “similar conduct.” (*Id.* at 8-
22 11.) Additionally, GCE contends, “any damages awarded in this case may necessarily
23 result in prohibited duplicative redress for injured students” because the Department of
24 Education has indicated that its proposed fine is intended to “protect[] students and
25 taxpayers” and calculated the proposed fine by multiplying the number of affected doctoral
26 students by \$5,000. (*Id.* at 10-11.)

27 In reply, the FTC contends that GCE has “effectively concede[d] that the defense
28 pled in its Answer is not a defense it intends to pursue. To wit, GCE has yet to identify

1 any *previous* payment made to an agency that purportedly bears on the FTC’s recovery.
 2 Rather, GCE intends to argue that it is entitled to an offset if there are *future redress*
 3 payments to the Department of Education arising from claims that Defendants
 4 misrepresented their doctoral program. . . . [S]uch a claim is not encompassed by the
 5 defense actually pled in GCE’s Answer and thus fails to provide the FTC fair notice.”
 6 (Doc. 134 at 5-6.) Next, the FTC argues that “GCE’s argument confuses defenses resting
 7 on extant facts that have yet to be developed with defenses lacking extant facts altogether”
 8 and that “no development of the facts on past or present events . . . would sustain GCE’s
 9 offset defense as it is undisputed that GCU has paid no fine to the Department of Education.
 10 GCE’s other cited cases similarly deal with defenses that could be developed during
 11 discovery, and not on the hypothetical outcome of a collateral matter.” (*Id.* at 6-7.) Finally,
 12 as for whether a fine paid to the Department of Education could ever provide the basis for
 13 an offset in an FTC enforcement action, the FTC argues that the Department of Education’s
 14 proposed fine “is a civil fine payable to the United States, not redress to injured students.
 15 Thus, even if GCU paid a civil fine to the Department of Education, that would not be a
 16 basis for reducing the redress to consumers under Section 19 of the FTC Act.” (*Id.* at 7
 17 n.2.)

18 2. Analysis

19 The Court agrees with the FTC that GCE’s sixth affirmative defense should be
 20 stricken. Although the challenged defense alleges that GCE is entitled to an offset for
 21 “amounts previously paid to regulatory agencies related to the same conduct” (Doc. 73 at
 22 31), GCE has now clarified that it is not seeking an offset based on any previous payment
 23 to a regulatory agency—instead, GCE seeks to preserve its ability to seek an offset based
 24 on a threatened future fine by the Department of Education. The sixth affirmative defense,
 25 as presently worded, would not apply to such a fine. Nor does GCE plead (or identify in
 26 its motion papers) any past payments to regulatory agencies that might fall within the scope
 27 of the sixth affirmative defense as presently worded.

28 The next question is whether GCE should be granted leave to amend. That question

1 is governed by Rule 15(a) of the Federal Rules of Civil Procedure, which “advises the court
 2 that ‘leave [to amend] shall be freely given when justice so requires.’” *Eminence Capital,*
 3 *LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1051 (9th Cir. 2003). “This policy is ‘to be applied
 4 with extreme liberality.’” *Id.* Thus, leave to amend should be granted unless “the
 5 amendment: (1) prejudices the opposing party; (2) is sought in bad faith; (3) produces an
 6 undue delay in litigation; or (4) is futile.” *AmerisourceBergen Corp. v. Dialysist W., Inc.*,
 7 465 F.3d 946, 951 (9th Cir. 2006).

8 Applying those standards, GCE is entitled to leave to amend as to its offset-related
 9 affirmative defense. Amendment would not be futile because GCE can cure the deficiency
 10 identified above by changing the wording of its affirmative defense to encompass the
 11 contemplated future fine by the Department of Education. Changing the wording in this
 12 fashion will also eliminate the fair notice and vagueness concerns raised by the FTC.

13 The FTC also appears to contend that amendment would be futile for a different
 14 reason—because an affirmative defense can never be based on a specific collateral
 15 development, known to the parties, that is currently unfolding but not yet finalized. The
 16 Court disagrees but also notes that even if the FTC were correct on this point, the remedy
 17 would simply be to strike the sixth affirmative defense without leave to amend for the time
 18 being, with the understanding that if the Department of Education fine later came to
 19 fruition, GCE would have good cause under Rules 15 and 16 to seek leave to amend at that
 20 point in order to reassert its offset-based affirmative defense. *Macias v. Cleaver*, 2016 WL
 21 8730687, *2 (E.D. Cal. 2016) (“Good cause may be demonstrated by a change in
 22 circumstance or newly discovered facts.”). It would not advance Rule 1’s aim of promoting
 23 the “just, speedy, and inexpensive” determination of this action to require the parties to go
 24 through such unnecessary and inefficient hoops.

25 Finally, to the extent the FTC contends that amendment would be futile because an
 26 offset in this action cannot be based on a fine paid to a different regulatory agency that is
 27 not subsequently distributed to consumers, the Court is unprepared to categorically reject
 28 the possibility of such an offset at this early stage of the case where the issue has not been

1 fully briefed and where the details of the contemplated fine are undeveloped.

2 **D. GCE’s Ninth Affirmative Defense (Agent Liability)**

3 **1. The Parties’ Arguments**

4 GCE’s ninth affirmative defense provides as follows: “GCE cannot be held liable
5 as an agent for acts upon which the principal is not held liable.” (Doc. 73 at 32.)

6 The FTC contends this affirmative defense should be stricken because it “misstate[s]
7 the law.” (Doc. 124 at 9.) The FTC continues: “There is no requirement that the FTC
8 obtain judgment against all possible defendants, nor does a settlement with some possible
9 defendants without an admission of liability preclude the FTC from obtaining relief against
10 other defendants participating in the same misconduct.” (*Id.* at 9-11, citing cases.) The
11 FTC also contends this defense should be stricken “because discovery and motions practice
12 elaborating on [it] would unnecessarily delay resolution of this case.” (*Id.* at 11.)

13 In response, GCE does not dispute any of the FTC’s legal arguments—instead, it
14 simply argues that “courts in the Ninth Circuit routinely decline to strike affirmative
15 defenses” on the ground that they misstate the law. (Doc. 130 at 11.) In other words, GCE
16 argues that “the question of whether to strike an affirmative defense turns on the issue of
17 fair notice and does not wade into the likelihood of success on the merits.” (*Id.* at 12.)
18 GCE also argues that the FTC would not be prejudiced by allowing this affirmative defense
19 to remain part of the case. (*Id.* at 13-14.)

20 In reply, the FTC argues that GCE’s position “conflate[s] fair notice and legal
21 validity. An affirmative defense may be insufficient under Rule 12(f) as a matter of
22 pleading (*i.e.*, because it fails to provide proper notice) *or* as a matter of law.” (Doc. 134
23 at 7-8.)

24 **2. Analysis**

25 The Court agrees with the FTC that GCE’s ninth affirmative defense should be
26 stricken. GCE makes no effort to dispute the FTC’s showing that this affirmative defense
27 fails as a matter of law. It would serve no purpose—and potentially cause mischief—to
28 allow such a facially invalid affirmative defense to remain part of the case. *See, e.g., Torres*

v. Goddard, 2008 WL 1817994, *1 (D. Ariz. 2008) (“Motions to strike are generally regarded with disfavor, but are proper when a defense is insufficient as a matter of law.”); Sec. People, Inc. v. Classic Woodworking, LLC, 2005 WL 645592, *3 (N.D. Cal. 2005) (“Although Rule 12(f) motions are generally viewed with disfavor because striking a portion of a pleading is often sought by a movant simply as a dilatory tactic, an affirmative defense that would not, under the facts alleged, constitute a valid defense to the action can and should be deleted.”) (cleaned up). This dismissal is without leave to amend because amendment would be futile.

E. Mueller's Ninth Affirmative Defense (Officer Liability)

1. The Parties' Arguments

Mueller's ninth affirmative defense provides: "Defendant Mueller cannot be held liable for acts upon which the other Defendants are not held liable." (Doc. 100 at 12.)

The FTC’s arguments regarding Mueller’s officer-liability affirmative defense mirror its arguments concerning GCE’s agent-liability affirmative defense—the FTC argues that Mueller’s version should be stricken because it misstates the law and would lead to unnecessary discovery and motions practice. (Doc. 124 at 8-12.)

Unlike GCE, Mueller seeks to defend the legal basis for his challenged affirmative defense. According to Mueller, “[u]nder the FTC Act, an individual may be liable for corporate practices in violation of the Act once corporate liability is established.” (Doc. 132 at 4.) Thus, Mueller contends that “the FTC must establish GCE’s liability before it can hold Mr. Mueller individually liable for corporate violations.” (*Id.* at 4-5.) Alternatively, Mueller argues—as did GCE—that legal insufficiency is not a basis for striking an affirmative defense. (*Id.* at 5.)

In reply, the FTC reiterates its argument that legal insufficiency is a valid basis for striking an affirmative defense. (Doc. 134 at 7-8.) The FTC’s only response to Mueller’s merits-based argument is that “proof of the alleged misconduct is sufficient to hold participants in a deceptive practice liable” and that Mueller’s brief does “not identify any basis in statute or case law for [his] contention that the absence of a judgment against a

1 codefendant is a defense.” (*Id.* at 8.)

2 2. Analysis

3 The FTC’s request to strike Mueller’s ninth affirmative defense is denied. In
 4 response to Mueller’s earlier motion to dismiss, the FTC stated that it intends “to hold
 5 Defendant Mueller liable for the misconduct by GCE and GCU.” (Doc. 44 at 24.) The
 6 FTC added: “[E]ven if GCU were not a defendant, all five counts state claims against
 7 Mueller for the misconduct of GCE. . . . [Dismissing GCU] would not shield Mueller from
 8 liability for GCE’s misconduct in deceptively marketing on behalf of GCU and making
 9 abusive telemarketing calls.” (*Id.*)

10 In the August 15, 2024 order, the Court accepted the FTC’s arguments on these
 11 points, explaining that “under Ninth Circuit law, individual monetary liability for a
 12 corporation’s violations of § 5 of the FTC Act requires proof of both (1) authority to control
 13 the challenged representations and (2) some degree of awareness of, or reckless disregard
 14 concerning, the challenged representations.” (Doc. 56 at 47.) The Court further noted that
 15 “the Ninth Circuit has held that when the FTC seeks injunctive relief against an individual
 16 based on corporate-entity violations, the only required showing is that the individual
 17 participated directly in the violations or had authority to control the entity.” (*Id.* at 49,
 18 emphasis omitted.)

19 As this backdrop shows, at least some of the FTC’s claims against Mueller appear
 20 to be derivative-liability claims that must be predicated on a finding that GCE violated the
 21 FTC Act or the TSR. At least as to that subset of claims, Mueller’s ninth affirmative
 22 defense appears to be correct—he cannot be held liable without a predicate finding of
 23 corporate misconduct. *See generally F.T.C. v. Cyberspace.Com LLC*, 453 F.3d 1196, 1202
 24 (9th Cir. 2006) (“An individual is personally liable for a corporation’s FTCA § 5 violations
 25 if he participated directly in the acts or practices or had authority to control them and had
 26 actual knowledge of material misrepresentations, was recklessly indifferent to the truth or
 27 falsity of a misrepresentation, or had an awareness of a high probability of fraud along with
 28 an intentional avoidance of the truth.”) (cleaned up) (emphasis added).

1 **F. Mueller's Fifteenth Affirmative Defense (Estoppel)**

2 1. The Parties' Arguments

3 Mueller's fifteenth affirmative defense begins as follows: "The FTC cannot seek or
4 enforce equitable remedies under the doctrines of unclean hands, estoppel, or other
5 equitable defenses." (Doc. 100 at 13.) Mueller then alleges the following additional facts
6 in support of those defenses:

7 Plaintiff, in coordination with the Department of Education, unfairly and
8 unreasonably singled out Defendants for investigation and litigation over the
9 same or similar disclosure practices used by numerous doctoral degree
10 granting institutions. It is common practice among such institutions to
11 describe doctoral programs in terms of the minimum academic course
12 requirements, notwithstanding the fact that students may require several
13 additional courses to complete the dissertation component. Nonetheless,
14 Plaintiff filed this action to force Defendant GCU to litigate the same issues
15 against multiple agencies in multiple forums, to Defendants' detriment and
16 expense. The FTC's misrepresentation claims are nearly identical to those
17 the United States Department of Education previously raised, which are
18 simultaneously being litigated in the Department's administrative tribunal.
19 In addition, the FTC seeks to relitigate the Department's decision on GCU's
20 nonprofit status, which was pending on appeal with the Ninth Circuit when
21 the FTC filed its initial complaint. On information and belief, both actions
22 were taken in retaliation for Defendant Grand Canyon University filing a
23 legal challenge to the Department's denial of GCU's nonprofit status.
24 Defendant forms this belief, in part, based on Plaintiff's coordination and
25 communication with the Department throughout its investigation, including
26 improperly sharing with the Department documents Defendant GCU
27 produced in response to the FTC's civil investigative demand, in violation of
28 GCU's confidentiality rights under the FTC Act. The belief is further
 supported by the timing of the agencies' respective actions in pursuing
 overlapping claims. By way of example, the Department issued a press
 release on October 31, 2023, accusing Defendant GCU of harming doctoral
 students and, in statements to the press, encouraged students to file
 complaints and seek student loan discharges, despite eschewing any
 requirement to establish student harm and not having identified any affected
 doctoral students during its investigation. Nearly two months later, after the
 Department accused GCU (without evidence) of harming students and
 encouraged those students to file complaints seeking loan discharges, the
 FTC filed this action seeking restitution and other damages. Stated
 differently, Defendant alleges (among other things) that the FTC coordinated

1 its investigation and litigation with the Department to manufacture student
 2 complaints in support of its claims here.

3 (*Id.* at 13-14.)

4 The FTC contends the “estoppel” portion of this affirmative defense should be
 5 stricken because it is “conclusory” and “provides no meaningful notice” of the specific
 6 conduct that might support a claim of estoppel. (Doc. 124 at 4-5.) The FTC elaborates
 7 that “Mueller has not identified any material fact that the FTC affirmatively misrepresented
 8 or concealed” and has not “alleged detrimental reliance” on that unspecified representation.
 9 (*Id.* at 5.) The FTC cites several cases, including *FTC v. OMICS Grp.*, 2017 WL 6806802,
 10 *3 (D. Nev. 2017) (“[T]he defense fails as a matter of law when the defendant pleads
 11 nothing more than the word ‘estoppel’ and fails to allege its necessary elements.”), in which
 12 courts struck conclusory estoppel-based affirmative defenses in FTC enforcement actions.
 13 (*Id.* at 5.)

14 In response, Mueller contends that “[c]ontrary to the FTC’s motion, Mr. Mueller
 15 has done more than merely ‘invoke the word estoppel.’ Mr. Mueller’s fifteenth affirmative
 16 defense alleges that the Department of Education and the FTC coordinated their efforts to
 17 manufacture student complaints for which the FTC now seeks a monetary award. When
 18 the Department issued its press release accusing GCU of harming its students and
 19 encouraging them to file complaints, the agencies knew that the Department had not
 20 established student harm but intended its statements to trigger student complaints with the
 21 prospect of loan forgiveness and sequenced their efforts such that GCU confined its
 22 response to the Department’s investigation to its detriment. Indeed, the government then
 23 misrepresented the Department’s findings in public statements (*i.e.*, by alleging as fact
 24 student harm occurred despite not identifying such harm in its findings) to manufacture
 25 complaints for which the FTC now seeks monetary damages. In short, Mr. Mueller’s
 26 answer alleges that the government engaged in affirmative misconduct that violates notions
 27 of basic fairness for which estoppel is appropriate.” (Doc. 132 at 2-3.)

28 In reply, the FTC contends that “estoppel is an equitable defense with specific

1 elements that are simply absent from Mueller’s Answer and that the Opposition fails to
 2 address.” (Doc. 134 at 4.) In particular, the FTC emphasizes Mueller’s failure to identify
 3 any “representation or misconduct by the FTC (the agency Mueller asserts is estopped)”
 4 and failure to identify any “ignorance or detrimental reliance by Defendant Mueller.” (*Id.*
 5 at 4-5.) The FTC concludes: “To plead a valid estoppel defense, an Answer must do more
 6 than assert that the government has been unfair.” (*Id.* at 5.)

7 2. Analysis

8 Mueller’s fifteenth affirmative defense is unusual because it seeks to raise at least
 9 two distinct defenses, estoppel and unclean hands, and then alleges, without differentiation,
 10 a laundry list of facts in support of those defenses. Notably, the FTC has not moved to
 11 strike the “unclean hands” component of Mueller’s fifteenth affirmative defense—its
 12 argument here is limited to the “estoppel” component.

13 The Court agrees with the FTC that the “estoppel” component of this affirmative
 14 defense should be stricken. Although Mueller contends that his underlying factual
 15 allegations show that “the Department of Education and the FTC coordinated their efforts
 16 to manufacture student complaints for which the FTC now seeks a monetary award” and
 17 otherwise “engaged in affirmative misconduct that violates basic notions of fairness” (Doc.
 18 132 at 2), Mueller does not explain why these very serious allegations, if true, could support
 19 an estoppel-based defense (as opposed to an unclean hands-based defense). Among other
 20 things, estoppel claims against the government require a showing that the defendant
 21 “rel[ied] to its detriment on the conduct of the party to be estopped,” *Vickars-Henry Corp.*
 22 *v. Bd. of Governors of Fed. Rsrvc. Sys.*, 629 F.2d 629, 635 (9th Cir. 1980), but Mueller’s
 23 amended answer does not allege—and Mueller does not contend in his response—that he
 24 detrimentally relied on any of the challenged conduct. Because the “estoppel” portion of
 25 Mueller’s fifteenth affirmative defense “would not, under the facts alleged, constitute a
 26 valid defense to the action,” it “can and should be deleted.” *Sec. People, Inc.*, 2005 WL
 27 645592 at *3. This dismissal is with leave to amend because it may be possible for Mueller
 28 to allege new facts sufficient to cure this deficiency.

1 **G. Mueller’s Fifteenth Affirmative Defense (Other Equitable Defenses)**

2 1. The Parties’ Arguments

3 As noted, Mueller’s fifteenth affirmative defense begins as follows: “The FTC
 4 cannot seek or enforce equitable remedies under the doctrines of unclean hands, estoppel,
 5 or other equitable defenses.” (Doc. 100 at 13.)

6 The FTC contends the “other equitable defenses” portion of this affirmative defense
 7 should be stricken because Mueller “fails to give the FTC fair notice of even the names of
 8 these defenses, let alone their legal and factual predicates.” (Doc. 124 at 5-6.)

9 In response, Mueller merely asserts in a footnote that “the FTC has shown no
 10 prejudice from [his] ‘reservation’ of ‘other equitable defenses’ . . . , which is a sufficient
 11 basis to deny the motion to strike.” (Doc. 132 at 4 n.2.) Mueller also cites cases stating
 12 that “[t]here is nothing dumber than a motion to strike boilerplate affirmative defenses; it
 13 wastes the client’s money and the court’s time.” (*Id.*, citation omitted.)

14 In reply, the FTC argues that “Mueller’s ‘other equitable defenses’ affirmative
 15 defense is an improper reservation of rights and should be stricken for that independent
 16 reason. The Opposition makes no attempt to identify the basis for these defenses or
 17 otherwise provide fair notice to the FTC. Rather, the only argument offered is that the FTC
 18 would not be prejudiced by their inclusion . . . [but] courts routinely dismiss this improper
 19 ‘defense’ even without requiring a separate showing of prejudice.” (Doc. 134 at 5.)

20 2. Analysis

21 The Court agrees with the FTC that the “other equitable defenses” portion of
 22 Mueller’s fifteenth affirmative defense should be stricken. As noted elsewhere in this
 23 order, the FTC does not need to establish prejudice to prevail on a motion to strike—
 24 dismissal is warranted if, as here, the challenged affirmative defense would not constitute
 25 a valid defense under the facts alleged. *See also FTC v. N. Am. Mktg. & Assocs., LLC*,
 26 2012 WL 5034967, *3 (D. Ariz. 2012) (“An attempt to reserve affirmative defenses for a
 27 future date is not a proper affirmative defense in itself. Instead, if at some later date
 28 defendants seek to add affirmative defenses, they must comply with Rule 15 of the Federal

1 Rules of Civil Procedure. . . . The Court will strike the Vigil and Lowry Defendants'
 2 reservation of the right to allege additional affirmative defenses.") (cleaned up). This
 3 dismissal is without leave to amend because amendment would be futile.

4 **IV. GCE's And Mueller's Motion For Stay Of Discovery**

5 **A. Relevant Background**

6 On February 10, 2025—that is, after the other three motions being addressed in this
 7 order had become fully briefed, and just before the Court issued its tentative ruling
 8 addressing the other three motions—GCE and Mueller filed the final motion being
 9 addressed in this order, a “motion to stay discovery on nonprofit claims.” (Doc. 136.)¹¹

10 On February 24, 2025, the FTC filed a response. (Doc. 141.)

11 On March 3, 2025, GCE and Mueller filed a reply. (Doc. 142.)

12 **B. The Parties' Arguments**

13 In a nutshell, GCE and Mueller argue that because the Ninth Circuit’s recent
 14 *Cardona* decision has caused “the factual basis for the FTC’s nonprofit claims [to be]
 15 presently eliminated,” the Court should stay discovery as to those claims until the
 16 Department of Education completes its post-remand review of GCU’s applications to be
 17 recognized as a nonprofit under the Higher Education Act of 1965. (Doc. 136 at 1.)

18 In response, the FTC argues the stay request “is predicated on three false assertions:
 19 (I) the FTC’s nonprofit claims are predicated upon [the] Department of Education’s
 20 classification of GCU under the HEA; (II) there is no factual basis for concluding that
 21 marketing GCU as a nonprofit institution is deceptive; and (III) the equities favor not
 22 allowing the FTC to complete discovery on these nonprofit issues.” (Doc. 141 at 7.)
 23 Additionally, the FTC accuses GCE and Mueller of dragging their feet in responding to
 24 certain discovery requests related to the nonprofit claims and “requests that the Court direct
 25 Defendants to complete their production and provide final written responses to the

26
 27 ¹¹ GCE’s and Mueller’s request for oral argument on this motion is denied because the
 28 issues are fully briefed (and, indeed, were addressed in a roundabout way during the oral
 argument on February 19, 2025) and because further argument would not aid the decisional
 process. See LRCiv 7.2(f).

1 outstanding discovery within seven days of its order denying their motion for a stay.” (*Id.*
 2 at 17.)

3 In reply, GCE and Mueller accuse the FTC of engaging in “an extraordinary attempt
 4 to backpedal on the factual basis for its nonprofit claims.” (Doc. 142 at 1.) GCE and
 5 Mueller also request, as an alternative to a stay, that the Court reverse its decision on an
 6 earlier discovery dispute and hold that the FTC is “not . . . entitled to Defendants’
 7 communications with or about the [Department of Education’s] review and determination
 8 (nor any communications with the IRS, the university’s accreditor, etc.).” (*Id.* at 6-7 &
 9 n.7.) Finally, GCE and Mueller oppose the FTC’s request for an accelerated response
 10 deadline to the outstanding discovery requests. (*Id.* at 8-9.)

11 C. Legal Standard

12 District courts have “wide discretion in controlling discovery,” which includes the
 13 discretion to issue an order staying discovery until a collateral issue is resolved. *Little v.*
14 City of Seattle, 863 F.2d 681, 685 (9th Cir. 1988). *See also Wenger v. Monroe*, 282 F.3d
 15 1068, 1077 (9th Cir. 2002) (affirming the district court’s entry of a “protective order . . .
 16 which barred Wenger from conducting additional discovery pending resolution of the
 17 Guard’s motion to dismiss”). This discretion arises both from Rule 26(c)—which, as
 18 discussed in Part II above, authorizes the issuance of a protective order upon a showing of
 19 “good cause”—and “as an incident to [the court’s] power to control its own docket.”
Clinton v. Jones, 520 U.S. 681, 706 (1997). With that said, “[t]he party seeking a stay of
 21 discovery carries the heavy burden of making a strong showing why discovery should be
 22 denied. The moving party must show a particular and specific need for the protective order,
 23 as opposed to making stereotyped or conclusory statements.” *DRK Photo v. McGraw-Hill*
24 Companies, Inc., 2012 WL 5936681, *1 (D. Ariz. 2012) (cleaned up).

25 D. Analysis

26 GCE and Mueller have not met their burden of establishing an entitlement to a stay
 27 of discovery concerning the FTC’s nonprofit-related claims. First, and most important, the
 28 Court is not persuaded that *Cardona* eliminates the factual basis for those claims. As

1 discussed in Part II.C above, one way the FTC may attempt to establish consumer
 2 confusion in this case, as required to prevail on Count One, is by showing that consumers’
 3 understanding of the term “nonprofit” differs from the reality of how GCU was structured.
 4 Although the Department of Education’s disposition of GCU’s applications to be
 5 recognized as a nonprofit under the Higher Education Act of 1965 may be relevant in
 6 assessing consumers’ understanding of that term—a point that the FTC seemingly
 7 acknowledges in the FAC (Doc. 62 ¶ 25) and that the Court accepted in the August 15,
 8 2024 order (Doc. 56 at 32)—it is not necessarily dispositive. To the contrary, “[a]lthough
 9 the parties may dispute what it means to meet the legal definition of a ‘nonprofit’ in various
 10 contexts . . . what the parties, *agencies*, or this Court understand that term to mean does not
 11 necessarily determine how consumers would interpret Defendants’ marketing.” (Doc. 56
 12 at 32, emphasis added.)

13 Second, the parties’ debate over whether *Cardona* eliminates the factual basis for
 14 Count One also underscores the procedural irregularity of the pending stay request.
 15 Ordinarily, a request for a stay of discovery related to a particular claim is coupled with
 16 the filing of a dispositive motion directed toward that claim. Even in that situation, the
 17 stay request is viewed “unfavorably,” in part because “the Federal Rules of Civil Procedure
 18 does not provide for automatic or blanket stays of discovery when a potentially dispositive
 19 motion is pending.” *Mlejnecky v. Olympus Imaging Am., Inc.*, 2011 WL 489743, *6 (E.D.
 20 Cal. 2011). Although “[t]he Ninth Circuit has not set forth a clear standard for district
 21 courts to apply in this situation . . . [m]ost federal district courts . . . apply a two-part test
 22 under which it is appropriate to stay discovery if (1) the pending motion must be potentially
 23 dispositive of the entire case, or at least dispositive on the issue at which discovery is aimed
 24 and (2) the pending, potentially dispositive motion can be decided absent additional
 25 discovery. Discovery should proceed if either prong of the test is not met.” *Ferrell v.*
 26 *AppFolio, Inc.*, 2024 WL 132223, *1 (C.D. Cal. 2024) (cleaned up). Here, there is not
 27 even a pending dispositive motion. Instead, GCE and Mueller simply assert, as part of
 28 their stay request, that *Cardona* has effectively undermined the factual basis for Count One,

1 but the relief they seek as part of that disguised dispositive-motion argument is not the
 2 dismissal of Count One, but an indefinite stay of a portion of this action¹²—during which
 3 Count One will remain pending—until a separate administrative proceeding is completed.
 4 The Court is not persuaded that this unorthodox approach would promote the “just, speedy,
 5 and inexpensive” determination of this action, as contemplated by Rule 1. This is
 6 particularly true because, as discussed in Part II.A above, the Court previously granted
 7 Defendants’ request for a stay of discovery pending the resolution of all their motions to
 8 dismiss. (Doc. 47 at 10-12; Doc. 51.) However, once the Court concluded that Count One
 9 should survive GCE’s and Mueller’s dismissal arguments, it lifted the stay and authorized
 10 discovery to proceed. (Doc. 56 at 52.) It would be anomalous to reinstitute the stay now,
 11 where Count One still survives and is no longer the subject of any pending dispositive
 12 motions.

13 Third, the requested stay would be highly inefficient. As the FTC correctly notes,
 14 GCE and Mueller are, in substance, seeking “an open-ended stay that would effectively
 15 bifurcate this case less than 90 days before the close of fact discovery.” (Doc. 141 at 1.)
 16 The stay thus has the potential to result in duplicative depositions, as witnesses would be
 17 forced to be deposed once in relation to some of the FTC’s claims (as to which no stay is
 18 being sought) and then potentially deposed again in relation to the nonprofit claims.
 19 Additionally, if the stay were granted, it is likely the parties would then engage in time-
 20 consuming, inefficient litigation over whether certain outstanding discovery requests are
 21 covered or partially covered by the stay.

22 For these reasons, the stay request is denied.

23 Finally, to the extent the parties have attempted to tuck affirmative requests for
 24 separate relief into their response and reply briefs—such as the FTC’s request for an order
 25 requiring GCE and Mueller to provide certain discovery responses within seven days of

26 ¹² In their reply, GCE and Mueller “propose that the Court impose a predetermined
 27 45-day stay and schedule a status conference at the end . . . to assess the Department’s
 28 progress.” (Doc. 142 at 8.) However, there is no reason to believe the anticipated
 administrative proceedings will be completed in 45 days or anything close to that
 timeframe.

1 the issuance of this order (Doc. 141 at 16-17) and GCE's and Mueller's request to limit the
2 scope of certain pending discovery requests (Doc. 142 at 6)—those requests are both
3 procedurally improper, *see Fed. R. Civ. P. 7(b)(1)* (“A request for a court order must be
4 made by motion.”), and denied on the merits.

5 Accordingly,

6 **IT IS ORDERED** that:

7 1. GCU's motion to dismiss (Doc. 71) is **granted**. GCU is **dismissed** as a party
8 to this action.

9 2. GCU's motion to quash and/or for protective order (Doc. 117) is **denied**.

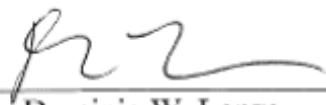
10 3. The FTC's motion to strike affirmative defenses (Doc. 124) is **granted in
11 part and denied in part**.

12 4. Within 14 days of the issuance of this order, GCE may file an amended
13 answer and Mueller may file a second amended answer. The changes shall be limited to
14 attempting to cure the subset of deficiencies raised in this order as to which leave to amend
15 was granted and GCE and/or Mueller shall, consistent with LRCiv 15.1(a), attach a
16 redlined version of the pleading as an exhibit.

17 5. GCE's and Mueller's motion for a stay of discovery (Doc. 136) is **denied**.

18 Dated this 6th day of March, 2025.

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Dominic W. Lanza
United States District Judge